Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

Term, 1976
No. 225

DALE H. REINHART,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent

RESPONDENT'S OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS INVOLVED

Commonwealth's questions 1, 2, and 3 are adopted as logically set out in the opinion of the Pennsylvania Supreme Court which covers all relevant issues in the instant case. (p. 16, Pet. Brief)

1. Is Pennsylvania rule of criminal procedure 314(a) which provides that a trial court may, upon request of the Commonwealth, grant a nolle prosequi "not withstanding the objection of any person", valid under the Federal Constitution?

2. Was petitioner denied due process of law under the Federal Constitution and the Constitution of Pennsylvania Article I, Section 9 by the trial courts grant of a nolle prosequi?

3. Was the trial court's grant of a nolle prosequi an abuse of discretion?

4. Is the doctrine of imperious necessity applicable?

STATEMENT OF THE CASE

This case arose as the result of a motion and grant of a nolle prosequi by the trial court. The Pennsylvania Supreme Court affirmed the order of the trial court, and the case is before your Honors on petition for a Writ of Certiorari to that court.

The petitioner was one of four persons charged with the murder of John Lamont Miller on June 3, 1969, in his home in Schuylkill County during the commission of a burglary. The police had no clue until more than two and one-half years later.

During early February of 1972, after several hours of drinking with undercover agents of the Pennsylvania State Police, Joseph Francis Bowers confided that he and three other men had been involved in the burglary-murder of Miller on June 3, 1969. As the result of this and subsequent statements by Bowers, a complaint was filed against Bowers on March 8, 1972, and he was indicted on July 13, 1972.

Further statements by Bowers to the police implicated the petitioner, and one Kemmerling, and one Schneck in the murder. Criminal complaints against the latter three were filed on June 27, 1972, and they were indicted on October 4, 1972. On October 2, 1972, two days before petitioner was indicted, his then counsel withdrew and the public defender was appointed. The case was called to trial November 15, 1972, and a continuance was granted at the request of petitioner's counsel because he was not ready to go to

trial. Nine pre-trial motions were filed by the petitioner during the months of November and December, commencing November 6, 1972, the last of which was disposed of by the trial court on January 2, 1973.

Schneck's case proceeded more quickly than did petitioner's. A jury was sworn in Schneck's case on January 8, 1973. Bowers, the only witness able to link both Schneck and petitioner to the crimes charged was called but refused to testify, asserting his right to remain silent. The Commonwealth, caught by surprise, was unable to prove its case against Schneck and was unable to obtain either a continuance or a nolle prosequi. Schneck was acquitted.

On January 8, 1973, petitioner's case was attached for trial, and the process of selection of a jury began. After the selection of three jurors, who were not sworn, the case was adjourned until the morning of January 9, when the Commonwealth asked for and was granted a short continuance to determine whether Bowers, a vital witness who refused to testify the preceding day in Schneck's case would again refuse to testify if called as a witness in petitioner's case. During the recess, Bowers reiterated that he would refuse to testify in petitioner's trial. For this reason, a continuance was requested by the Commonwealth and refused by the trial court. The Commonwealth then motioned for a nolle prosequi, and after hearing argument by the Commonwealth and petitioner in the forenoon, the trial court after consideration granted the nolle prosequi that afternoon [illegible]it: January 9, 1973. Upon appeal of the

petitioner to the Pennsylvania Supreme Court, the Order of the Trial Court granting nolle prosequi was affirmed. *Commonwealth v. Reinhart,* Pa. 353 A 2d 848, March 18, 1976.

It is from this ruling that the petitioner requests the present writ.

ARGUMENT
Reasons Why Writ Should Be Denied

1. Is Pennsylvania rule of criminal procedure 314(a), which provides that a trial court may upon request of the Commonwealth, grant a nolle prosequi "not withstanding the objection of any person", valid under the Federal Constitution?

The petitioner challenges the Constitutionality of 314(a). (p. 4, Pet. Brief) The Pennsylvania Supreme Court noted that the petitioner was permitted to present objections to the trial court and that the trial court indicated it considered the merits of the petitioner's argument. The Court further said (p. 20, Pet. Brief):

> "The Rule in no way bans the presentation of objections by the defendant nor does it direct the trial court to ignore those objections. It merely states that the defendant's objection is not dispositive of the issue."

Therefore, no Constitutional rights of the defendant are violated by the above Rule.

2. Was petitioner denied due process of law under the Federal Constitution and the Constitution of Pennsylvania article I, Section 9 by the trial court's grant of a nolle prosequi?

For the sake of clarity, the following chronology of the record of the lower court is presented for consideration indicating the time element complained of:

January 3, 1969 — Date of alleged crime.

July 27, 1972 — Complaint filed.

October 4, 1972 — Grand Jury indictment approved.

October 10, 1972 — Arraignment.

November 6, 1972 — First of nine pre-trial applications filed.

November 15, 1972 — Case called for trial and continuance granted to petitioner.

January 2, 1973 — Last pre-trial application disposed of by trial court.

January 8, 1973 — Schneck jury selected, sworn and trial commenced.

January 8, 1973 — Petitioner's trial called; three jurors selected but not sworn.

January 9, 1973 — Motion for continuance by Commonwealth refused. Motion for Nolle Prosequi granted. Defendant released from custody.

The petitioner contends he was deprived of due process of law under the Federal Constitution and Pennsylvania Constitution. The Pennsylvania Constitution as to right of a speedy trial is fundamentally similar to the Federal Constitution.

A speedy trial claim is analyzed in two steps: (1) is the delay sufficiently long to trigger the necessity for an inquiry in the other factors that

go into the balance, and (2) a balancing of the length of delay, reason for delay, accused's assertion of the right, and prejudice to the accused. (p. 21, Pet. Brief)

The chronology above indicates a delay of 93 days from indictment and that the delay in part was due to petitioner's pre-trial motions.

In support of his petition, the petitioner relies mainly on *Klopfer v. North Carolina,* 386 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), a civil rights case where defendant participated in a restaurant demonstration. That case is distinguished in many ways from the instant case. (1) A trial had been held in which the jury disagreed and a mistrial was declared. (2) Thereafter, nothing was done by the Commonwealth for 18 months. (3) A nolle prosequi was granted without offering any justification or reason for the delay. (4) The case was remanded for trial. (5) The defendant was unable under North Carolina law to either have the case tried or dismissed.

Pennsylvania Rules of Criminal Procedure 304, adopted June 30, 1965, provides for a pre-trial right of defendant for application to quash. (See N. 7, p. 22, Pet. Brief)

The instant case involves a major felony. (1) This was not a re-trial. (2) Only 93 days expired from the date of the indictment to the grant of the nolle prosequi. (3) The Commonwealth offered a valid reason for the delay. *Commonwealth v. Reinhart,* (p. 25, Pet. Brief) (353 A 2d 848, March 18, 1976)

The total delay, including the time lost due to the petitioner's request for a continuance from the date of approval of the indictment to January 9, 1973 is 93 days.

The Pennsylvania Supreme Court said in the instant case:

> "The total delay from indictment to nolle prosequi was 93 days. We do not believe that a 93 day delay is sufficient to trigger the full speedy trial inquiry when the charge involved is a major felony. We therefore hold that the grant of a nolle prosequi on January 8, 1973, did not deny appellant his right to a speedy trial because the delay involved was not sufficiently long to be presumptively prejudicial." (p. 22-23, Pet. Brief)

3. Was the trial court's grant of a nolle prosequi an abuse of discretion?

The Commonwealth contends the trial court did not abuse its discretion in granting the nolle prosequi. The Commonwealth in requesting the nolle prosequi asserted that without Bowers' testimony, it could not prove a prima facia case. (Trial transcript p. 18) The trial court after refusing a continuance granted a nolle prosequi. Both the Commonwealth and the defendant were heard by the trial court. The trial court in its written opinion relying on Pennsylvania Rule of Criminal Procedure 314(a) and *Commonwealth v. DiPasquale,* 431 Pa. 536, 246 A2d 430 (1968) stated that the grant of the nolle prosequi was a proper exercise

of its discretion. (p. 15, Pet. Brief) The Court in *DiPasquale* said (p. 432):

> "The grant or refusal of a petition for Nolle Prosequi and continuance lies within the sound discretion of the lower court, and its action will not be reversed in the absence of an abuse of discretion."

In the instant case, the Pennsylvania Supreme Court said:

> "A trial court's grant of a nolle prosequi will not be overturned on appeal unless it appears to be an abuse of discretion. Pennsylvania law indicates that there are two factors to be considered when a request for a nolle prosequi is made: (1) is the reason given by the Commonwealth for requesting the nolle prosequi valid and reasonable, and (2) does the defendant, at the time the nolle prosequi is requested, have a valid speedy trial claim? We have already determined that an appellant did not have a speedy trial claim on January 8." (p. 23-24 Pet. Brief)

Applying the standards of *Barker v. Wingo,* 407 U. S. 514, 534, 92 S. Ct. 2182, 2194 (p. 24-25, Pet. Brief), the court concluded that the instant case was parallel to the *Barker* case, and that some delay was permissable under ordinary circumstances. The Commonwealth did have a valid reason, and the action of the lower court was affirmed.

The case of *Commonwealth v. Gant,* 213 Pa. Super. 427, 249 A2d 845 (1968), cited by petitioner is inapposite. There, (1) a new trial was awarded; (2) 8 months had passed, and (3) no justification was offered for the delay.

Commonwealth v. Leaming, 442 Pa. 223, 275 A2d 43, (1971), cited by petitioner is also distinguished. (1) A new trial was granted, (2) There was no retrial for more than 2 years, and (3) The chief witness was hopelessly insane and there was no likelihood of a trial in the forseeable future. The Court held this to be an abuse of discretion. This opinion was written by Justice Roberts, who wrote the opinion in the instant case.

In both these Pennsylvania cases, the appellate court remanded the cases for trial, as the U. S. Supreme Court did in *Klopfer.*

4. Is the doctrine of imperious necessity applicable?

The double jeopardy clause under the Fifth Amendment is not in issue, therefore, the question of the exercise of the discretion of the court on the basis of "imperious necessity" has no application to any issue in this case. Consequently, *Dawnum v. United States,* 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963) is not controlling. Only three jurors were selected but not sworn. Double jeopardy does not attach until the jury has been impanelled and sworn. *Commonwealth v. Smith,* 232 Pa. Super. 546, 334 A2d 741 (1975)

The initial delay was triggered by the refusal of Bowers to testify on January 9, 1973. Bowers was tried and convicted; his motion for a new

trial was refused and he is ordered to appear for sentence on September 13, 1976. In the meantime Schneck, who was freed, has now agreed to testify against the defendant. A motion to vacate the nolle prosequi as to petitioner was granted by the trial court. Now, it is interesting to note the defendant has appealed this order vacating the nolle prosequi to the appellate courts of Pennsylvania. Consequently, his request for this Writ of Certiorari is illogical and inappropriate under the record as it stands.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

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